Supreme Court, U.S.
FILED

021617 MAY 1 2003

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No. 02-

IN THE

Supreme Court of the United States

PHILLIS ROBINSON BRANCH,

Petitioner,

v.

SONY MUSIC ENTERTAINMENT, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

LENNOX S. HINDS
Counsel of Record
AARON DAVID FRISHBERG
STEVENS, HINDS & WHITE, PC
Attorneys for Petitioner
116 W. 111th Street
New York, NY 10026
(212) 864-4445

180594

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

32 pp

QUESTIONS PRESENTED

Whether Petitioner, seeking to show disparate treatment in an employment discrimination case, should have been required to support of a *prima facie* claim of discrimination by overcoming her employer's asserted distinctions between her and the employees she identified as comparators who had been treated more favorably.

Whether, for the purpose of summary judgment, the Respondent's claims that the decision-maker whom Petitioner asserted was responsible for her discriminatory termination lacked confidence in Petitioner should have been given weight as evidence of a non-discriminatory motive for the termination.

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York, dated March 7, 2001, Appendix B, is not reported.

The Summary Order of the United States Court of Appeals for the Second Circuit, dated May 14, 2002, Appendix A, is also not reported.

STATEMENT OF JURISDICTION

The order denying Petitioner's petition for rehearing or rehearing en banc was entered on January 31, 2003. (Appendix C). Jurisdiction is statutorily conferred upon this Court to review on certiorari the Summary Order of the Court of Appeals by 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

The relevant portion of 42 U.S.C. § 2000e-2 is as follows:

> Unlawful employment practices
>
> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
>
> (m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices
>
> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

STATEMENT OF THE CASE

Petitioner brought suit for employment discrimination following the termination of her employment, asserting that she her race (black). The court found that Petitioner had established a *prima facie* case under the McDonnell Douglas framework, in that her employment had been terminated, while a light-skinned Hispanic female had been given her position. However, Petitioner sought to establish, in support of her assertion that she had been discriminated against on the basis of her race, that the employer's explanations were a pretext for discrimination, that the decision-maker, the head of her department, had subjected her to disparate treatment on the basis of her race prior to her being laid off.

Petitioner was one of only two employees in her department whose position was essentially clerical and administrative, rather than technical or managerial. The District Court decision declined to give any weight to Petitioner's assertions that she had been treated less favorably than other employees in her department who had been recognized or rewarded for their significant contributions to the department's work, on the basis that these employees were in more responsible, executive positions, and that their contributions were of a different nature than Petitioner's. (Appendix B, at 13a). The District Court also accepted the employer's contention that Petitioner's claim that she was not treated with professional courtesy by the department head, as were other employees in her department, did not contribute to her claim because she was not similarly situated to these executive employees, expressed by the department head as Petitioner not being "one of the boys." (Appendix B, at 12a to14a).

Finally, the District Court found that Plaintiff had not sufficiently raised an issue of discrimination to survive a motion for summary judgment, in part because the department head had misgivings about her while he was confident in the performance of the Hispanic female who took over her job duties.

Petitioner submits that the District Court decision, which was substantially adopted by the Court of Appeals, erroneously narrowed the group of persons "similarly situated" with respect to discriminatory treatment to a point where it would be impossible for Petitioner or any Plaintiff who was discriminated against, who was uniquely or nearly uniquely situated with regard to job duties in a department of an employer to prove a claim of discriminatory treatment.

The District Court had subject matter jurisdiction over this controversy pursuant to 28 U.S.C. § 1331, federal question jurisdiction, and pursuant to 28 U.S.C. § 1343, to enforce civil rights secured by federal law.

REASONS FOR GRANTING THE PETITION

Petitioner submits that there is a division between this circuit and other circuit courts in the holding of the United States Court of Appeals for the Second Circuit in this and other cases addressing the issue of when a Plaintiff in an employment discrimination is similarly situated to other employees, for the purpose of showing discrimination under the McDonnell Douglas framework, and whether a Plaintiff should be required to establish this as part of the *prima facie* case, or at the stage of showing that the employer's assertions of non-discriminatory reasons are pretextual. Moreover, this question is not only an important one for the proper enforcement of employment discrimination laws, but is not one on which there is harmony among the lower courts, as shown by the significant splits among the circuits, and by the frequency of the overturning of district court decisions by the circuit courts of appeals.

Thus, the Second Circuit has treated the question of whether a plaintiff employee who is a member of a protected group is similarly situated to a comparator employee who is not a member of the protected group is part of the Plaintiff's *prima facie* case. *McGuiness v. Lincoln Hall*, 263 F.3d 49 (2d Cir. 1999). The same approach is taken by the Sixth Circuit, (*see Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344 (6th Cir. 1998), *Clayton v. Meijer*, (6th Cir. 2002), the Seventh Circuit (*see Stockett v. Muncie, Indiana Transit System*, 221 F.3d 997 (7th Cir. 2000), the Ninth Circuit

(*see Chuang v. University of California at Davis*, 225 F.3d 1115 (9th Cir. 2000), and the Eleventh Circuit (*see Lathem v. Department of Youth and Community Services*, 172 F.3d 786 (11th Cir. 1999). To the same effect is *Barbour v. Browner*, 181 F.3d 1342 (D.C. Cir. 1999), in which the District of Columbia Circuit held that the District Court should have dismissed the Plaintiff's case as a matter of law, and that she had not established her comparability to the employee she claimed had been more favorably treated.

On the other hand, the First Circuit Court of Appeals held, in *Conward v. Cambridge School Committee*, 171 F.3d 12 (1st Cir. 1999), that the District Court had erred in evaluating the Plaintiff's comparability with other employees as part of his *prima facie* case, and that this comparison should have been considered as part of his proof that the employer's explanations were pretextual. In the same vein is *Lynn v. Deaconess Medical Center*, 160 F.3d 884 (8th Cir. 1998), evaluating the Plaintiff's claim that other employees who were disciplined less severely than him at the pretest stage. In *Ortiz v. Norton*, 254 F.3d 689 (10th Cir. 1999), the Tenth Circuit criticized the requirement that the Plaintiff establish his comparability to other employees as part of his *prima facie* case as preventing a Plaintiff from rebutting the pretextual nature of the employer's distinctions.

Of the former group, *Stockett v. Muncie, Indiana Transit System*, *supra*, 221 F.3d 997 particularly well illustrates the distinction. In that case, the employee Plaintiff protested his disparate treatment in being discharged after suspicion of drug use led to his being tested. The Court of Appeals held that he was treated exactly the same as another employee who was not required to take a test after suspicions arose of his using drugs, because they were both observed by

supervisors, and only the black employee's condition gave rise to probable cause to believe that he might be using drugs. This is but another way of stating that the two employees were not comparably situated with respect to the manner in which they were indisputably treated differently, being required to take the drug test.

There is an enormous difference between an approach which would treat this employee's *prima facie* case as showing that the other employee's condition was equally susceptible to giving rise to probable cause, and one which permits the employee to show from the totality of circumstances that the employer's determination that only he should be tested was based on a bias, rather than a factually supportable difference in the observable evidence of drug use.

When the Stockett approach is embraced, as it was by the District Court in the case at bar, in holding that there was a difference between the two employees because the supervisor had more confidence in one, the barrier to proving a discriminatory decision-making process may become insurmountable.

When the employer's decision-maker's subjective evaluation is given credence as evidence of a nondiscriminatory motive, without requiring the employer to articulate some verifiable criteria for its subjective evaluation, even the weighing of evidence at the pretext stage is skewed in the employer's direction, since what would otherwise be evidence of bias is discounted by an evaluation which may itself be tainted, but which may never be allowed to be tested by a jury.

Not only has there been a significant fissure among the circuit courts, even with respect to the question of at what stage of the proceeding comparability arises. The frequency of reversal of district court opinions strongly suggests that the lower courts are in need of additional guidelines to address the issues of comparability. *See, e.g., Barbour v. Browner, supra*; *McGuiness v. Lincoln Hall, supra*; *Ercegovich, supra*; *Lynn v. Deaconess Medical Center*; *Chuang v. University of California at Davis, supra*; *Ortiz v. Norton, supra*; *Lathem v. Department of Youth and Community Services, supra.*

Beyond the question of whether comparability should be considered at the first or third stage, there is a telling difference between those circuits which have placed greater emphasis on the plight of the individual who may need to reach outside their immediate job category to show that others are better treated with respect to the same employer policy, *e.g., Ercegovich, supra, Lathem v. Department of Youth and Community Services, supra*, and especially, *Ortiz v. Norton, supra*, and those circuits in which the bar to showing similarity appears to be set higher. *See, e.g., Holbrook v. Reno*, 196 F.3d 255 (D.C. Cir. 1999), (probationary employee can not show similarly situated either to other probationary employees who were permitted to continue in training after disciplinary infractions, or to permanent employee who was suspended for ten days and transferred for like offense).

Petitioner respectfully submits that there are well-founded concerns, expressed by the Court of Appeals for the Tenth Circuit, in *Ortiz v. Norton*, 254 F.3d 689, *supra*, and by the Sixth Circuit Court of Appeals in *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, *supra*, that requiring a plaintiff to identify an identically matched person

not in the protected group to establish proof of discrimination. While there is a near universal agreement in the circuits on the formula that similarly situated means only that the comparator be similarly situated in all relevant respects, this seeming agreement presents a tautological statement, and masks important differences among the circuits as to how much leeway is to be permitted a plaintiff in proving a *prima facie* case and in showing pretext.

CONCLUSION

This Court should grant the within petition for certiorari to resolve a division among the circuits on an important question of employment discrimination law, the appropriate use of comparators in Plaintiffs meeting their burden of proof.

Respectfully submitted,

LENNOX S. HINDS
Counsel of Record
AARON DAVID FRISHBERG
STEVENS, HINDS & WHITE, PC
Attorneys for Petitioner
116 W. 111th Street
New York, NY 10026
(212) 864-4445